

Judgment and diversity

Thinking with Hannah Arendt about the composition of international court benches

DANA SCHMALZ — 3 May, 2017



If the number of female judges in an international tribunal is one out of twenty-one, as in the case of the [International Tribunal for the Law of the Sea](#) (ITLOS), we can assume that there is a problem. Not because a woman's judgment would necessarily and predictably be different, as Selen Kazan [has discussed](#). But, as Nienke Grossman [also explains here](#), because women are just as qualified to serve as judges, so that such significant underrepresentation can typically be traced back to mechanisms of exclusion in the nomination procedures. And while there certainly is not one "female perspective", the underrepresentation of women on international court benches does affect also the outcomes: as illustrates the Feminist Judgments Project that Troy Lavers and Loveday Hodson [have presented](#), international legal norms and decisions often expose structural biases and inequitable assumptions. The (diverse!) perspectives of women are needed for tackling these limitations and for working towards a more inclusionary and just interpretation of international law.

But how exactly do a critique of biases in the outcomes and of the procedures of appointment relate? It is not hard to agree that the presence of women on international court benches matters, both as a claim for equal access, and as a chance for more informed and legitimate decisions. But it is harder to clearly situate this claim in our understanding of judgment. It is not hard to agree that something is wrong, but it is harder to tell how things would be right. Is there a tension between the idea of impartiality and the very concept of judgment, and criteria of representativeness for the composition of courts? In this contribution, I will sketch a few thoughts on how Hannah Arendt's conception of judgment is helpful in thinking about that question.

Aren't judges required to be impartial anyway?

Essential to the concept of judgment is the idea that a person can abstract from his or her immediate situation, what we find reflected in standards such as impartiality, independence, and "high moral character" (cf. for example Art. 2 of the [ICJ Statute](#), or Art. 21 of the [ECHR](#)). The institution of a court relies on the assumption that judges are able to look beyond their own interests and opinions, and to rule about matters they have never experienced. A judge deciding about early prison release will usually have no experience in what it means to be incarcerated. A judge in divorce proceedings may not have gone

herself through a divorce. And yet it is generally assumed that they will be able to render a fair decision based on their knowledge about the law and their general life experiences.

At the same time, the standards of independence and impartiality do not mean that any “good judge” will come to the same conclusion, no matter where she grew up, what experiences he made, what her cultural background, academic education, personal challenges were. That the background of judges matters is well accepted in international courts when it comes to criteria of geographic distribution and of nationality: The rules of composition of the ITLOS contain requirements for a minimum number of judges from each geographical area. The rules of the ICC, of the ICJ, and of the IACtHR include negative criteria that no more than two judges should hold the same nationality.

How can we square the notion of impartiality with claims for more diverse benches? Where does the dimension of judgment as abstracting from one’s own perspective meet with the dimension of judgment as making sense of one’s knowledge about the world – the knowledge, which is certainly different for every person?

Hannah Arendt’s concept of judgment

Human plurality constitutes a central theme in Hannah Arendt’s thought, and in that connection her concept of judgment provides a valuable source for thinking about diversity in the context of courts. Arendt deals with judging as one of the three basic mental activities in her last book “The Life of the Mind” (LotM). Or was planning to deal with, as she died before writing the third part of the book, the one on judging. Nevertheless, there is a number of passages about the faculty of judgment in previous parts of her book and in other writings, most importantly in her “Lectures on Kant’s Political Philosophy” (LoKPP).

What prompted Arendt to engage with the question of judgment was indeed a court proceeding: the trial of Adolf Eichmann in 1961, which she reported for the New Yorker. Finding the “banality of evil” to lie exactly in the “failure to think” and in the abstention from proper judgment, Arendt turned in her late work to a systematic consideration of the human faculty of thinking. This occupation was at the same time one of engaging with the philosophical traditions of metaphysics, with what Arendt herself labels as the “reversal of the metaphysical hierarchy”, the turning focus of philosophy towards “the value of the surface” (LotM, 26).

Judgment and human plurality

Drawing on the philosophy of Immanuel Kant, Arendt describes the faculty of judgment as bringing together the general and the particular. This can be in form of determinant judgment, in which a particular is subsumed under a general, and in form of reflective judgment, in which one “ascends” from the particular to the general (LotM, 69). Whereas the former regards the search for cognitive truths, the latter relates to the search for meaning and understanding.

Reflective judgment for Arendt has an inherently social character: On the one hand, judgment as mental activity requires a form of withdrawal, it belongs to the *vita contemplativa* as opposed to the *vita activa*. On the other hand, judgment forms the process, in which we test our views of the world and seek agreement with others. The practice of judging thus takes place from a position of withdrawal, but still with regard to the perspective of others, along the criterion of “communicability” (LoKPP, 63 et seq). The withdrawal of the judge is one to the position of a spectator, outside the activity but not

without a standpoint, a point of view quite literally. What is crucial in Arendt's conception of judgment is the condition of human plurality, thus the move from a spectator in the singular to a "spectator in the plural". The standard of judgment implies a perspective of intersubjectivity: In a first step, judging requires a distance of the spectator from the object of judgment. But in a second step, judging requires the faculty of "enlarged thinking", for which the sense of community and the perspective of others are relevant.

Judgment and human particularity

Human plurality is central for Arendt's concept of judgment, and so is human particularity or distinctness. It is human distinctness that makes action and speech necessary, and forms an irreducible part of human plurality. In judging, a person discloses herself, and judgment is possible only from one's own standpoint. In Arendt's view, the sense of taste, the most immediate of our senses, forms the paradigm for the idea of judgment ([LotM](#), 111). The immediacy of taste illustrates the need for an own standpoint, and the impossibility to abstain from judgment. This impossibility to abstain from judgment can also be framed as the responsibility of judgment, as it appears in Arendt's reflections about the Eichmann trial.

Back to international courts

What can we draw from these reflections about judgment as a human faculty for the practice of international courts and more specifically the composition of court benches? Arendt makes clear that the judging person's own standpoint is an essential part of the faculty of judgment. The awareness about an own standpoint and the disclosure in action and speech is not in contradiction with the ability to assume the role of a spectator, to "withdraw" from activities of political life. Arendt's reflections thus offer an understanding of judgment as neither neutral or separate from the person of the judge, nor as determined by the judge's identity or as political in the sense of partisanship. Impartiality, the ability of withdrawal, and reasoning from one's own standpoint along the criterion of communicability constitute two aspects of the mental process of judging.

Moreover, human distinctness is not understood as separating, or as determinative for a person's views, but as a necessary element in the exchange with others. In that sense, diversity in the composition of court benches is indeed a question of enriching the communicative processes in which the court collectively "ascends from the particular to the general", interprets the facts of and the law for a particular case. The diverse composition of international courts is important for tackling inequalities and blind

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